Federal Rules Decisions
March 1964

*325 PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

PART I—AMENDMENTS TO EFFECT UNIFICATION OF CIVIL AND ADMIRALTY PROCEDURE

PART II—OTHER AMENDMENTS

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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***329 Committee on Rules of Practice and Procedure of the Judicial Conference of the United States**

To the Bench and Bar:

The Advisory Committees on Civil and Admiralty Rules appointed by the Chief Justice of the United States under the program of the Judicial Conference of the United States for the study of procedural rules, inaugurated pursuant to authority conferred upon the Conference by 28 U.S.C. § 331 as amended in 1958, has submitted to our committee for consideration and ultimate report to the Conference and by it to the Supreme Court, two drafts of proposed amendments to the Federal Rules of Civil Procedure.

Proposals to Unify Civil and Admiralty Procedure (Part I)

The first of these drafts, appearing in Part I of this pamphlet (pages 331 to 370), was prepared by the Advisory Committee on Admiralty Rules and is designed to effect the unification of the admiralty and civil procedure. It consists of proposals for the amendment of the Federal Rules of Civil Procedure and the addition thereto of supplemental rules for certain admiralty and maritime cases, prefaced by an accompanying explanatory letter from the Advisory Committee on Admiralty Rules. The draft, exclusive of the supplemental rules, was submitted to and has the approval of the Advisory Committee on Civil Rules.

Other Proposals for Civil Rules Amendments (Part II)

The other draft of proposed amendments to the Federal Rules of Civil Procedure which has been submitted to us was prepared by the Advisory Committee on Civil Rules and involves proposed amendments to the Civil Rules which do not directly relate to the unification of the civil and admiralty procedure. These proposals appear in Part II of this pamphlet (pages 371 to 410). While they primarily involve the practice in the traditional type of civil cases, they will, of course, if adopted, and if the unification rules set out in Part I are also adopted, apply also to admiralty and maritime cases to the extent that they affect procedure in such cases. The draft was accordingly submitted to and has the approval of the Advisory Committee on Admiralty Rules.

The Advisory Committee on Civil Rules has under way a study of the rules relating to pretrial discovery. Proposed amendments resulting from this study will be separately submitted at a future time.

***330** *Appellate Proposals Submitted Separately*

The amendments to the Federal Rules of Civil Procedure submitted herewith do not include amendments to the rules which relate to appellate procedure, except for those amendments to Rule 73 which are needed to complete the unification of admiralty and civil procedure. The study of appellate procedure and the formulation of proposals for its

improvement have been entrusted by the Judicial Conference to the Advisory Committee on Appellate Rules which has proposed a draft of uniform rules of federal appellate procedure. This draft has been printed in a separate pamphlet. Title II of the draft rules of appellate procedure includes the substance of Rules 73, 74, and 75 of the Federal Rules of Civil Procedure with substantial changes designed to improve the appellate procedure now prescribed by those Rules. If and when the Supreme Court comes to promulgate these changes under its existing rulemaking power, the Federal Rules of Civil Procedure will be amended to conform thereto.

Submission to Bench and Bar

Our committee has not yet considered in detail the amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committees on Civil and Admiralty Rules as set out in Parts I and II of this pamphlet, but submits them herewith to the Bench and Bar for consideration and suggestions. **We request that all suggestions be in the hands of our committee as soon as convenient and in any event not later than April 1, 1965 so that we may have the benefit of them when final consideration is given to the proposals.**

All communications should be addressed to the Committee on Rules of Practice and Procedure, Supreme Court Building, Washington, D.C., 20544.

These draft amendments have not yet been submitted to or considered by the Judicial Conference or the Supreme Court, and it should be understood that the Court is in no way committed to them and has not given them any consideration.

ALBERT B. MARIS, *Chairman*

WILL SHAFROTH, *Secretary*

MARCH 31, 1964

***331 PART I**

AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS PROPOSED BY THE ADVISORY COMMITTEE ON ADMIRALTY RULES

Letter of Transmittal by the Advisory Commitee:

TO THE CHAIRMAN AND MEMBERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

At your first meeting, December 22, 1959, you unanimously resolved to "request the Advisory Committee on Admiralty Rules to conduct a preliminary study with respect to the advisability of adopting the proposal that the admiralty procedure be integrated into the civil procedure and to report thereon before proceeding to draft admiralty rules." On August 13, 1962, we reported to you "that it is the sense of this Committee that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings." We now recommend the adoption of certain amendments to the Federal Rules of Civil Procedure necessary to effectuate a plan of unification, together with a set of Supplemental Rules for Certain Admiralty and Maritime Cases.

The Rules of Practice in Admiralty and Maritime Cases, dating from 1845, have never been a comprehensive code of procedure. Yet those rules, supplemented by case law and by tradition, formed the core of a practice which in the federal courts was long and justly cherished for its relative liberality, flexibility, and adaptation to the ends of substantial justice. With the promulgation of the Federal Rules of Civil Procedure in 1938, however, the relative position of the admiralty practice in federal civil litigation was materially altered. The distinction between actions at law and suits in equity was abolished, and a modern, comprehensive system of procedure, designed above all "to secure the just, speedy, and inexpensive determination of every action," was established. In the light of the Civil Rules the need for modernization and supplementation of the Admiralty Rules became

apparent. Some of the notably successful procedures established by the Civil Rules were formally incorporated into the Admiralty Rules; others were adopted for the admiralty practice by exercise of the rule-making power of the district courts; still others ***332** provided an analogy to be employed by judges in admiralty cases to fill gaps in, or to improve upon, the admiralty practice. In 1950, Attorney General McGrath reported to the Judicial Conference:

> In the field of admiralty, I would like to direct your attention to the urgent need for revision of admiralty practice to bring it into accord with modern Federal practice. Specifically, it is the view of my Department, as the chief litigant in admiralty cases, that the time is now ripe for appropriate action by the Supreme Court to make available to the district courts in their admiralty practice the modern procedural advantages of the Federal Rules of Civil Procedure. (Report of the Judicial Conference of the United States, 1950, p. 32)

In 1953, the Maritime Law Association of the United States, in its Document 375, proposed a new admiralty rule to the effect that "The Federal Rules of Civil Procedure shall be applicable to cases in Admiralty as near as may be," subject to a number of exceptions. In this proposal the American Bar Association concurred. See 78 Rep.A.B.A. 188 (1953). Thus for ten years there has been general agreement that the Civil Rules should be made applicable to admiralty cases in so far as practicable.

Our recommendation goes beyond this and similar proposals to superimpose the Civil Rules on the existing Admiralty Rules. Not only is there need for a modern and comprehensive set of rules for practice in admiralty cases. There is also need to abolish the formal distinction between civil actions and suits in admiralty, and to provide for one form of civil action, just as the distinction between actions at law and suits in equity was abolished in 1938. This is not a novel proposal. The great conception that resulted in the Federal Rules of Civil Procedure was originally not confined to the merger of law and equity, but included admiralty as well. The late Chief Justice Taft, speaking to the Chicago Bar Association in 1921, said:

> The second step that should be taken is a simplification of the procedure in all cases in the Federal trial courts. We still retain in those courts the distinction between suits at law, suits in equity, and suits in admiralty. The Constitution refers specifically to them, and in deference to that separation in the Constitution, the distinction is preserved in the Federal practice. It seems to me that there is no reason why this distinction, so far as actual practice is concerned, should not be wholly abolished, and what are now suits in law, in equity and in admiralty, should not be conducted in the form of one civil action, just as is done in the code states. Of course it will be necessary in such a system to preserve the substantial differences in procedure and right which are insured by the Constitution and are of the utmost value in the administration***333** of justice. (Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34, 35 (1922).)

The beneficial effects of the merger of law and equity will hardly be questioned. We believe that comparable effects will follow the merger of suits in admiralty and civil actions, in accordance with the original conception. In 1962, on recommendation of the Board of Governors, the House of Delegates of the American Bar Association adopted the following resolution:

> That the American Bar Association favors unification of the rules of Practice of the Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable; and authorizes the Standing Committee on Admiralty and Maritime Law of this Association to co-operate with the Advisory Committee on Admiralty Rules of Practice of the Supreme Court toward that end. (87 Rep.A.B.A. 155 (1962))

Our reasons for recommending unification, or merger, apart from the need to make available in admiralty cases the modern and comprehensive

provisions of the Civil Rules, may be briefly summarized. It will be recognized that they are basically similar to the reasons underlying the merger of law and equity:

1. In the words of the late Arnold W. Knauth, a charter member of this Committee, "The near approach of the common law-equity procedure to the relatively simple and untechnical state of the traditional Admiralty practice has produced a new series of traps and pit-falls consisting of the remaining differences, frequently subtle in their nature, to trap the unwary...." (2 *Benedict on Admiralty* iii-iv (6th ed. (Knauth) 1940)). Mr. Knauth went on to note that differences between the admiralty and civil practices must persist so long as the Supreme Court lacked, with respect to admiralty rules, the power to supersede inconsistent statutes that it exercised with respect to civil rules. Needless to say, that obstacle to uniformity has been removed by the present enabling legislation. (28 U.S.C. § 2073.)

2. To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the nonspecialist lawyer who finds himself—sometimes to his surprise—involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice," said Mr. Justice Jackson, "is a unique system of substantive law and procedure with which members of this Court are singularly deficient in experience." *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386, 403, 69 S.Ct. 622, 93 L.Ed. 754 (1949) (dissenting opinion). The comment applies generally to all levels of the judiciary. The distinctiveness of substantive maritime law is a matter beyond the competence of this Committee, even if we were disposed to ***334** concern ourselves with it; indeed, it is probably too much to hope that we can ever be spared the necessity of more or less recondite bodies of substantive law, whether they relate to maritime affairs, or patents, or copyrights, or combinations in restraint of trade. It is multiplying the burden of the bench and bar, however, to require mastery of unnecessarily distinctive systems of practice and procedure.

3. Procedural differences constitute the main bulwark of a type of thinking that has built a wall of separation into the district court, dividing it into two compartments, or "sides," as if there were two separate courts. Such thinking at worst results in palpably unjust dismissals, and at best in wasteful disputations, amendments, and transfers between dockets. The situation is reminiscent of the practice of dismissing suits brought in equity when they should have been brought at law, and vice versa. See Clark & Moore, *A New Federal Procedure: I. The Background*, 44 Yale L.J. 387 (1935). For example, in 1955 an action at law for wrongful death, based on diversity of citizenship, was dismissed for lack of jurisdiction because the court held it should have been brought as a suit in admiralty. Transfer to the admiralty docket was refused although the action would be time-barred on refiling. *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir.1955). As recently as November 2, 1962, a district court dismissed "for lack of jurisdiction" a complaint based on unseaworthiness, because the court construed the complaint as asserting a civil action, and diversity of citizenship was not alleged. Transfer to the admiralty docket was denied. *Walker v. Dravo Corp.*, 210 F.Supp. 386 (W.D.Pa.1962). See generally Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U.Chi.L.Rev. 1 (1959); 5 *Moore's Federal Practice* 67–70 (2d ed. 1951); Verleger, *On the Need for Procedural Reform in Admiralty*, 35 Tul.L.Rev. 61 (1960); Comment, *Admiralty Procedure and Proposals for Revision*, 61 Yale L.J. 204 (1952).

4. Similarly, the maintenance of separate procedures, and the attendant compartmentalization of the court, prevents full utilization of some of the most fundamental principles of modern procedure. Many a claim that, on principle, ought to be joined with another cannot be so joined if one is cognizable only in admiralty. Many a claim that, on principle, ought to be asserted as a counterclaim cannot be so asserted if one of the claims is cognizable only in admiralty. The same is true of cross-claims and third-party claims. It is ironical that the separation of admiralty should lead to such a result, since it was admiralty, along with equity, that provided the model for liberalization of the strict joinder rules of the common law, and it was specifically

Admiralty ***335** Rule 56 that provided the model for FRCP 14 on third-party practice. For present purposes one illustration must suffice: In a well-known and complex suit in admiralty, the owners of vessels recovered demurrage from the consignee of coal, but the consignee was denied the right to seek indemnity from the seller because the contract of sale was non-maritime. Yet there was plainly diversity of citizenship between seller and consignee. *Yone Suzuki v. Central Argentine Ry.*, 27 F.2d 795 (2d Cir.1928). "In matters of justice ... the benefactor is he who makes one lawsuit grow where two grew before." Wright, *Joinder of Claims and Parties under Modern Pleading Rules*, 36 Minn.L.Rev. 580 (1952). See also Millar, *Civil Procedure of the Trial Court in Historical Perspective* 8, 10 (1952).

Unification does not mean complete uniformity. There are certain distinctively maritime remedies that must be preserved, as distinctively equitable remedies were preserved in the merger of 1938. In addition, history or the exigencies of maritime litigation occasionally require procedures different from those now provided by the Civil Rules. The problems of unification and the methods employed for resolving them may be briefly summarized:

1. A number of the Admiralty Rules are already identical, or substantially identical, with Civil Rules.

2. A large number of the Civil Rules are appropriate without modification for application to what are now suits in admiralty.

3. In several instances modifications of the Civil Rules recommended by this Committee have been found appropriate for application to what are now civil actions.

4. In a few instances special provision has been made in the Civil Rules for what are now proceedings in admiralty, the distinction being drawn in terms of the jurisdictional basis for the claim.

5. The distinctively maritime remedies (attachment and garnishment, process in rem, possessory and petitory actions, and limitation of liability) are treated in a set of Supplemental Rules.

Of necessity, our recommendations are based primarily on the Civil Rules as amended July 1, 1963. However, we have considered also the currently proposed amendments, approved by the Advisory Committee on Civil Rules at its meeting October 31–November 2, 1963 [and appearing in Part II of this pamphlet], and those proposed amendments have our approval as unified rules.

The amendments to the Federal Rules of Civil Procedure here proposed have been approved by the Advisory Committee on Civil Rules.

***336** We therefore recommend that the Rules of Civil Procedure for the United States District Courts be amended:

(1) By making the changes in Rules 1, 8, 9, 14, 17, 18, 20, 26, 38, 43, 53, 65, 68, 73, 81, 82, and 86 set forth in Appendix I;

(2) By adding thereto a new Rule 65.1, as set forth in Appendix I;

(3) By adding thereto the Supplemental Rules for Certain Admiralty and Maritime Cases set forth in Appendix II.

Respectfully submitted,

WALTER L. POPE,

Chairman, Advisory Committee on Admiralty Rules.

BRAINERD CURRIE,

Reporter, Advisory Committee on Admiralty Rules.

***337 APPENDIX I**

PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or *in admiralty*, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Advisory Committee's Note

This is the fundamental change necessary to effect unification. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

Rule 8. General Rules of Pleading

(e) Pleading to be Concise and Direct; Consistency.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, ~~or on equitable grounds or on both~~ *equitable, or admiralty and maritime grounds*. All statements shall be made subject to the obligations set forth in Rule 11.

Advisory Committee's Note

The change here is consistent with the broad purposes of unification.

Rule 9. Pleading Special Matters

(h) Admiralty and Maritime Claims. A pleading or a count setting forth a claim for relief within the admiralty and maritime jurisdiction which formerly would have been cognizable whether ****338*** *asserted in a civil action or in admiralty may contain a statement identifying the claim as an admiralty and maritime claim for the purposes of Rules 26(a), 38(e), 73(i), 82, and the Supplemental Rules for Certain Admiralty and Maritime Cases. If the claim would formerly have been cognizable only in admiralty it is an admiralty and maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.*

Advisory Committee's Note

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial

except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly, as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, process in rem, possessory and petitory actions, and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forgo mention of all available jurisditional grounds.

***339** Other methods of solving the problem have been carefully explored, but the Advisory Committee has concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty and maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty and maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

Rule 14. Third–Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a ~~defendant~~ *defending party*, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant

may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. *The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo or other property subject to admiralty and maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party* ***340*** *plaintiff or defendant include, where appropriate, the claimant of the property arrested.*

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) Special Instances of Apportioned Liability. A defendant, as third-party plaintiff, may bring in a third-party defendant in the manner provided in this rule when the plaintiff's claim against the third-party plaintiff is such that, had the plaintiff commenced an action thereon against the third-party plaintiff and the third-party defendant, and had both been held liable, the liability would, as a matter of law, be apportioned in the judgments against them. When a third-party defendant is brought in on this basis, the third-party plaintiff may demand judgment in favor of the plaintiff against the third-party defendant, and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Advisory Committee's Note

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 is that it allows impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision is that the defendant is entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this is a valuable implementation of a substantial right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the present rule a third party may not be impleaded on the basis that he may be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases in which liability may be apportioned if others potentially liable to the plaintiff are before the court is clearly desirable. This is true of cases governed by the substantive admiralty and

maritime law whether the claim is asserted (to use present terminology) in a civil action or in admiralty. The general principle seems equally applicable to any nonmaritime case in which the original defendant may suffer a liability which, as a matter of law, would be diminished or qualified if another party had been joined and found liable. The principle does not extend to the ordinary case of joint tort-feasors, each liable to the plaintiff for the full amount of the judgment, even though there may be a substantive right to contribution. It covers only the case in which, if both defendants are held liable, their liability to the plaintiff will be apportioned.

***341** Full utilization of this type of impleader may not be possible in cases in which jurisdiction rests upon diversity of citizenship. That, however, is not a good reason for withholding the remedy in those cases in which it can usefully be applied. The other reason for the abandonment of this remedy in 1946—that such impleader was futile because the plaintiff could not be compelled to amend and assert a claim against the third-party defendant—is obviated here by resort to the formula of Admiralty Rule 56: when process is duly served on the third-party defendant, the action is to proceed as if he had originally been made a party.

A minority of the Advisory Committee is of the opinion that the principle of Admiralty Rule 56, allowing impleader on the ground that the third-party defendant is liable to the plaintiff, should be more clearly and more broadly preserved. This question will be further considered in the light of public reaction to the proposed plan of unification.

Rule 17. Parties Plaintiff and Defendant: Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest~~;~~. ~~but A~~n executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. *No action for loss or misdelivery of, or damage to, maritime cargo, or for general average contribution to such cargo, or for salvage, and no action for personal injury or death governed by section 33 of the Longshoremen's and Harborworkers' Compensation Act, as amended* [*Act of March 4, 1927, c. 509, § 33; 44 Stat. 1440, 33 U.S.C. § 933*]*, shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.*

Advisory Committee's Note

The minor change in the existing test of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule.

A recurring factual situation in maritime cases may lead to injustice if the requirement as to real party in interest is rigidly applied. When there are claims to be asserted on behalf of maritime cargo some or all of the following conditions may be present: (1) There are numerous lots of cargo and hence numerous potential claimants. (2) The true owner or other person entitled to sue cannot be readily determined. This results in part from the employment of diverse commercial instruments giving rise to problems of the passing of title. These may involve problems in the conflict of laws, including the laws of foreign countries. Questions also arise as to when the rights ***342** of an insurer as subrogee have been perfected. (3)

The time for filing suit is short, either because of a short limitation period, such as the one-year period of the Carriage of Goods by Sea Act, or because the only practicable remedy is arrest or attachment of a vessel whose departure is imminent.

The same considerations apply to actions to recover general average contributions owing to cargo interests.

Similar considerations apply to actions for personal injury or death brought against persons other than the employer under section 33 of the Longshoremen's and Harborworkers' Compensation Act. The provisions of that section relating to assignment of the injured employee's claim to the employer can give rise to situations in which it is not clear which is entitled to sue, and in which a mistake of judgment can result in forfeiture of a just claim. *Cf. Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387 (1956).

The specific reference to such claims is not intended, however, to have any negative implications for judicial avoidance of forfeitures in other cases. *Cf. Levinson* v. *Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C.Cir.1963).

It has been traditional practice in admiralty for suits for salvage to be filed by the owner or master on behalf of all those potentially entitled to share in the award. The evident convenience of this procedure has led to its general acceptance although the judgment in such a case would not seem to give complete theoretical protection to the defendant. See 1 *Benedict* § 123; *The Lowther Castle*, 195 Fed. 604 (D.N.J.1912); *The Neptune*, 277 Fed. 232 (2d Cir.1921). It is therefore reasonable to provide that in such cases the action may be commenced by a potentially interested party. The interests of the defendant are adequately protected if the real party in interest is made a party of record within a reasonable time after the objection is raised.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. ~~The plaintiff in his complaint or in a reply setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.~~ *A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join either as independent or as alternate claims as many claims, legal, equitable, or maritime, as he has against an opposing party.*

Advisory Committee's Note

Free joinder of claims and remedies is one of the basic purposes of unification. The Advisory Committee accordingly recommends the inclusion in the rule of maritime claims as well as those which are legal and equitable in character. With respect to the other changes in this rule, proposed by the Advisory Committee on Civil Rules, see page 377.

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in ***343** the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all ~~of them~~ *these persons* [FNa1] will arise in the action. All persons *(and any vessel, cargo or other property subject to admiralty process in rem)* may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions

or occurrences and if any question of law or fact common to all ~~of them~~ *these persons* [FNa1] will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Advisory Committee's Note

A basic purpose of unification is to reduce barriers to joinder.

Rule 26. Depositions Pending Action

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules~~.~~, *except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781)*. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Advisory Committee's Note

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions de bene esse, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

***344** Efforts have been made to devise a modification of the 20–day rule acceptable to both the Civil and Admiralty Committees, to the end that Rule 26(a) might state a uniform rule applicable alike to what are now civil actions and suits in admiralty. These efforts have so far been unsuccessful; and the Admiralty Committee has concluded that the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the postunification counterpart of the present suit in admiralty. Accordingly, the draft provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h). The possibility of a uniform rule will be further explored when current studies of the actual operation of the discovery rules have been completed.

Rule 38. Jury Trial of Right

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty and maritime claim within the meaning of Rule 9(h).

Advisory Committee's Note

See Note to Rule 9(h), *supra*.

Rule 43. Evidence

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is

admissible under the statutes of the United States ~~on the hearing of suits in equity~~, or under the rules of evidence heretofore applied in the courts of the United States, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Advisory Committee's Note

According to tradition, the rules of evidence in admiralty are distinguished for their liberality; strict common-law rules of exclusion are not binding. See, *e.g.*, *The Spica*, 289 Fed. 436 (2d Cir.1923) (Judge Hough). Proof of the tradition exists primarily in the experience of trial lawyers and judges; there is little in the reported cases to support it by way of direct holding as distinguished from dictum, and it seems based in large part simply on the fact that admiralty cases are typically tried to the court without a jury. An exceptional case is *Taylor v. Crain*, 224 F.2d 237 (3d Cir.1955), wherein the court, per Judge Goodrich, not feeling the constraint it would feel if Rule 43(a) had been applicable to suits in admiralty, was able to hold that the Pennsylvania Dead Man Statute was inapplicable in such a suit.

The spirit of Rule 43(a) is one of maximum admissibility. It would therefore be unfortunate if, after unification, that rule, while continuing to refer to the liberal practice in equity, were to omit reference to the practice in admiralty. The rule should contain no intimation of hostility to a respected ***345** tradition of liberality. The draft therefore eliminates the reference to equity, making the rule sufficiently broad to encompass the practice in the federal courts in admiralty as well.

Rule 53. Masters

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, ~~and~~ and examiner~~.~~, *a commissioner, and an assessor*. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account~~,~~ *and of difficult computation of damages*, a reference shall be made only upon a showing that some exceptional condition requires it.

Advisory Committee's Note

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

Rule 65. Injunctions

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of

such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

~~A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an ***346** independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.~~ *The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.*

Advisory Committee's Note

Rules 65 and 73 contain substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There is fragmentary coverage of the same subject in the admiralty rules. Clearly, a single comprehensive rule is required, and is proposed as Rule 65.1.

Rule 65.1. *Security: Proceedings Against Sureties*

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Cases, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Advisory Committee's Note

See Note to Rule 65.

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves writen notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. *When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the ***347** liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time prior to the commencement of proceedings to determine the amount or extent of liability.*

Advisory Committee's Note

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

Rule 73. Appeal to a Court of Appeals

(a) When and How Taken. *Except as provided in Title 28, U.S.C. § 1292(b) and Title 45, U.S.C. § 159*, ~~W~~*w*hen an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from ~~unless a shorter time is provided by law~~, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure ~~the~~ review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

***348 (d) Supersedeas Bond.** Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. *A separate supersedeas bond or bond for costs on appeal need not be given, unless otherwise ordered, when the appellant has already filed in the district court security including the event of appeal, except for the difference in amount, if any.*

(f) Judgments Against Surety. ~~By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d)of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without~~

~~the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.~~ *The provisions of Rule 65.1 apply to a surety upon an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule.*

(h) Extension of Time for Cross–Appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

***349** *(i) Interlocutory Appeals in Admiralty and Maritime Cases. These rules do not affect the appealability of interlocutory judgments in admiralty cases pursuant to Title 28, U.S.C., § 1292(a)(3). The reference in that statute to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h).*

Advisory Committee's Note

Subdivision (a). Unified rules should so far as reasonably possible provide a uniform time in which notice of appeal must be filed instead of the various times now provided.

Subdivision (d). The added sentence reflects a practice common in distinctively maritime proceedings.

Subdivision (f). See Note to Rule 65, *supra*.

Subdivision (h). The proposal protects the rights of a party who has no occasion to appeal unless another party does so, when the other party files his notice of appeal so near the end of the time for filing as to preclude his filing of a timely notice.

Subdivision (i). See Note to Rule 9(h), *supra*.

Special Note by the Committee on Rules of Practice and Procedure

The amendments to Rule 73 proposed above are those which the Advisory Committee on Admiralty Rules deems desirable in connection with the unification of the civil and admiralty rules. The draft of Uniform Rules of Federal Appellate Procedure, which has been proposed by the Advisory Committee on Appellate Rules and which appears in a separate pamphlet, embodies in its proposed Rule 4(a) (which is based on Civil Rule 73(a)) two additional changes in the substance of present Rule 73(a). To incorporate these two changes in Rule 73(a) will involve the amendment of the final clause of the first sentence so as to read as follows:

... and except that upon a showing of excusable neglect ~~based on a failure of a party to learn of the entry of the judgment~~ the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed.

and the amendment of the first clause of the second sentence to read as follows:

The running of the time for appeal is terminated *as to all parties* by a timely motion made pursuant to any of the rules hereinafter enumerated, ...

Rule 81. Applicability in General

(a) To What Proceedings Applicable

(1) These rules do not apply to *prize* proceedings in admiralty *governed by Title 10, U.S.C., §§ 7651 –81*. They do not apply to proceedings in bankruptcy ~~or proceedings in copyright under Title 17, U.S.C.,~~ [FNa2] except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy ***350** proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the

extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, *and* quo warranto.~~, and forfeiture of property for violation of a statute of the United States.~~ The requirements of Title 28, U.S.C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

Advisory Committee's Note

See Note to Rule 1, *supra*.

Statutory proceedings to forfeit property for violation of the laws of the United States, now governed by the admiralty rules, should be governed by the unified and supplemental rules. See Supplemental Rule A.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. *An admiralty and maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391–93.*

Advisory Committee's Note

Title 28, U.S.C., § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what are now suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action": i.e., a suit in admiralty is not a "civil action" within the statute. It is proposed, however, that Rule 2 will convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law.

Rule 86. Effective Date

[A suitable provision as to the effective date will be made either in Rule 86 or in the order of the Supreme Court transmitting the amendments.]

[FNa1]. With respect to these changes, see p. 383.

[FNa2]. With respect to the foregoing deletion, see p. 408.

***351 APPENDIX II**

PROPOSED SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CASES

Rule A. *Scope of Rules*

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(1) Process of maritime foreign attachment and garnishment;

(2) Process in rem;

(3) Possessory, petitory, and partition proceedings;

(4) Proceedings for exoneration from or limitation of liability.

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Advisory Committee's Note

Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty, although the amendment of Rule 4(e) effective July 1, 1963, makes available that procedure in accordance with state law. The maritime proceeding in rem is unique, except as it has been emulated by statute, and is closely related to the substantive maritime law relating to liens. Arrest of the vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 *Benedict* § 286; 28 U.S.C., § 2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3, and 4 are unnecessary or obsolete.

***352** No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent.

Rule B. *Attachment and Garnishment: Special Provisions*

(1) When Available; Complaint and Process. With respect to any admiralty and maritime claim in personam the complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. If the complaint is verified on oath or solemn affirmation the cleric shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

Advisory Committee's Note

This preserves the traditional maritime remedy of foreign attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. On the effect of appearance to defend against attachment see Rule E(8).

The draft follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, “if the defendant shall not be found within the district,” and no definition is attempted here. The subject seems one best left to development on a case-by-case basis.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee has considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state. It has concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person

of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction *(Seawind Compania, S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2d Cir.1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served *(United States* v. *Cia. Naviera Continental, S.A.*, 178 F.Supp. 561 (S.D.N.Y.1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

***353** *(2) Notice to Defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint and summons, or (b) that the complaint and summons have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.*

Advisory Committee's Note

The Admiralty Rules do not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. *Harris* v. *Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905); *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The draft therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The draft provides for these alternatives.

The draft does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

(3) Answer.

(a) By Garnishee. The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his

*hands or ***354** paid into the registry of the court, and shall be held in either case subject to the further order of the court.*

(b) By Defendant. The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

Advisory Committee's Note

Subdivision (a) incorporates the substance of Admiralty Rule 36.

The Admiralty Rules are silent as to when the garnishee and the defendant are to answer. See also 2 *Benedict* ch. XXIV.

The draft proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (*cf.* FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

Rule C. *Actions in Rem: Special Provisions*

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

Advisory Committee's Note

This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13–18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the admiralty rules, which is repetitious and incomplete (*e.g.*, there is no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13–18 is with the question whether certain actions may be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability.

***355** These rules may be summarized as follows—

1. Cases in which the plaintiff may proceed in rem and—or in personam:

a. Suits for seamen's wages;

b. Suits by materialmen for supplies, repairs, etc.;

c. Suits for pilotage;

d. Suits for collision damages; e. Suits founded on mere maritime hypothecation;

f. Suits for salvage.

2. Cases in which the plaintiff may proceed only in personam:

a. Suits for assault and beating.

3. Cases in which the plaintiff may proceed only in rem:

a. Suits on bottomry bonds.

The coverage is incomplete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. The draft proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The draft eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails to disclose arty reason for the rule. It is subject to so many exceptions that it is calculated to deceive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy, *The Rolph*, 293 Fed. 269, *aff'd* 299 Fed. 52 (9th Cir.1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness, *The David Evans*, 187 Fed. 775 (D.Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, *The Western States*, 159 Fed. 354 (2d Cir.1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

Advisory Committee's Note

This incorporates the substance of Admiralty Rules 21 and 22.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the ****356*** *marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.*

Advisory Committee's Note

Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to provide for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2

Benedict § 299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 now provides, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (*e.g.*, the cargo owner) would be required on general principles (*cf. Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905)) to notify his obligee (*e.g.*, the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (*e.g.*, there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9 .

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property has not been so released within 10 days after execution of the process the plaintiff shall cause public notice of the action and of the arrest to be given in such newspaper published within the district as the court shall order. Such notice shall specify the time within which the answer is required to be filed as provided by Rule C(6). This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

Advisory Committee's Note

This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If, however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

***357** *(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.*

Advisory Committee's Note

This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In *The George Prescott*, 10 Fed.Cas. 222 (No. 5,339) (E.D.N.Y.1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. *Cf. United States* v. *The Zarko*, 187 F.Supp. 371 (S.D.Cal.1960), where an armature belonging to a vessel subject to a

preferred ship mortgage was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 *Benedict* § 299). Also, the reference to "third parties" in the existing rule seems unfortunate. In *The George Prescott*, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action is against property that cannot be seized by the marshal because it is intangible, the original process must be similar to that issued against a garnishee, and general notice is required (though not provided for by the present rule; *cf.* Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property has been arrested and general notice has been given, but some of the property has been removed or for some other reason cannot be arrested. Here no further notice is necessary.

The draft also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

(6) Claim and Answer. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, and shall serve his answer within 20 ****358*** *days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent or bailee or the like, it shall state that he is duly authorized to make the claim.*

Advisory Committee's Note

Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings—before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on "the true and bona fide owner" is omitted, since anyone having the right to possession can claim (2 *Benedict* § 324).

Rule D. *Possessory, Petitory, and Partition Proceedings*

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the

possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by service of summons on the adverse party or parties.

Advisory Committee's Note

This carries forward the substance of Admiralty Rule 19.

Rule 19 provides the remedy of arrest in controversies involving title and possession in general. See *The Tilton*, 23 Fed.Cas. 1277 (No. 14,054) (C.C.D.Mass.1830). In addition it provides that remedy in controversies between co-owners respecting the employment of a vessel. It does not deal comprehensively with controversies between co-owners, omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See *The Steamboat Orleans*, 36 U.S. (11 Pet.) 175, 9 L.Ed. 677 (1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. ***359***Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954). It is therefore appropriate to include a reference to partition in the rule.

Rule E. *Actions in Rem and Quasi in Rem: General Provisions*

(1) Applicability. Except as otherwise provided, this Rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition proceedings, supplementing Rules B, C, and D.

(2) Security for Costs. Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

Advisory Committee's Note

Adapted from Admiralty Rule 24. The draft is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

(3) Process.

(a) Territorial Limits of Effective Service. Process in rem and of attachment and garnishment shall be served only within the district.

(b) Issuance and Delivery. Issuance and delivery of process in rem, or of attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

Advisory Committee's Note

The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admirality Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

(4) Execution of Process; Marshal's Return; Custody of Property.

(a) In General. Upon issuance and delivery of the process, or, in the case of summons with clause of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

***360** *(b) Tangible Property. If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy of the summons or warrant to the property in a conspicuous place and by leaving a copy of the complaint and summons or warrant with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.*

(c) Intangible Property. If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and summons or warrant requiring him to answer as provided in Rules B(3) (a) and C(6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) Directions with Respect to Property in Custody. The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(e) Expenses of Seizing and Keeping Property; Deposit. These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

Advisory Committee's Note

This rule is intended to preserve existing provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property seized by the marshal, and the marshal's return. It is also designed to supplement the existing rules by making express provision for matters not now covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 U.S.C., § 1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

(5) Release of Property.

(a) Special Bond. Except in cases of seizures for forfeiture under any law of the United States, whenever process of attachment and garnishment or process in rem is issued the execution ****361*** *of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the*

property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(b) General Bond. The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(*c*) *Order of Court; Release by Consent; Costs. No property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, on the filing of either a written consent thereto by the attorney on whose behalf the property is detained, or the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.*

(*d*) *Possessory, Petitory, and Partition Proceedings. The foregoing provisions of this subdivision (5) do not apply to petitory,* ****362*** *possessory, and partition proceedings. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.*

Advisory Committee's Note

In addition to Admiralty Rule 11 (see Rule E(9)), the release of property seized on process of attachment or in rem is dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 U.S.C., § 2464 (formerly Rev.Stat. § 941). An attempt is made in the draft to consolidate these provisions and to make them uniformly applicable to attachment and garnishment and actions in rem.

The draft restates the substance of Admiralty Rule 5. Admiralty Rule 12 deals only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 U.S.C., § 2464, Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 U.S.C., § 2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 *Benedict* 395 n. la; *The Lotosland*, 2 F.Supp. 42 (S.D.N.Y.1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

(*6*) *Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.*

Advisory Committee's Note

Adapted from Admiralty Rule 8.

(7) *Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the*

defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

Advisory Committee's Note

Derived from Admiralty Rule 50.

Title 46, U.S.C., § 783 extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit of the Government is the equivalent of the best security. The draft adopts this principle and extends it to all cases in which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

***363** (*8*) *Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.*

Advisory Committee's Note

Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

(9) Disposition of Property; Sales.

(*a*) *Actions for Forfeitures. In any action in*

rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(*b*) *Interlocutory Sales. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant*****364*** *or claimant, order delivery of the property to him, upon the giving of security in accordance with Rule E(5)(a).*

(*c*) *Sales; Proceeds. All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.*

Advisory Committee's Note

Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposition of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 U.S.C., §§ 2461–65.

The provision of Admiralty Rule 12 relating to unreasonable delay is now limited to ships but should have broader application. See 2 *Benedict* 404. Similarly, both rules are now limited to actions in rem, but should equally apply to attached property.

Rule F. *Limitation of Liability*

(*1*) *Time for Filing Petition; Security. Not later than six months after his receipt of a claim in writing, any vessel owner may petition the appropriate district court, as provided in subdivision* (*9*) *of this Rule, for limitation of liability pursuant to statute. The owner* (*a*) *shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or* (*b*) *at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The petitioner shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.*

Advisory Committee's Note

The amendments of 1936 to the Limitation Act supersede to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the petition and with respect to security. The draft here incorporates in substance the 1936 amendment of the Act (46 U.S.C., § 185) with a slight modification to make it clear that the petition may be filed at any time not later than six months after a claim has been lodged with the owner.

(*2*) *Petition. The petition shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the* *****365*** *owner's liability shall be limited. The petition may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including*

all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the petitioner, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the petitioner elects to transfer his interest in the vessel to a trustee, the petition must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Advisory Committee's Note

Derived from Admiralty Rules 51 and 53.

(*3*) *Claims against Owner: Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this Rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the petitioner the court shall enjoin the further prosecution of any action or proceeding against the petitioner or his property with respect to any claim subject to limitation in the proceeding.*

Advisory Committee's Note

This is derived from the last sentence of 46 U.S.C. § 185 and the last paragraph of Admiralty Rule 51.

(*4*) *Notice to Claimants. Upon the owner's compliance with subdivision* (*1*) *of this Rule the court shall issue a notice to all persons asserting claims with respect to which the petition seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the petitioner a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for* ****366*** *the filing of claims. The petitioner not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.*

Advisory Committee's Note

Derived from Admiralty Rule 51. The form of notice is omitted since the plan is to have an Appendix of Forms.

(*5*) *Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision* (*4*) *of this Rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the petition unless his claim has included an answer.*

Advisory Committee's Note

Derived from Admiralty Rules 52 and 53.

(*6*) *Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims or within such time as the*

court thereafter may allow, the petitioner shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

Advisory Committee's Note

Derived from Admiralty Rule 52.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the petitioner be increased on the ground that they are less than the value of the petitioner's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the petitioner's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to ****367*** *claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.*

Advisory Committee's Note

Derived from Admiralty Rule 52 and 46 U.S.C., § 185.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

Advisory Committee's Note

Derived from Admiralty Rule 52.

(9) Venue: Transfer. The petition shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the petitioner seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the petition may be filed in any district. The court may, in its discretion, transfer the proceedings to any district for the convenience of the parties. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

Advisory Committee's Note

Derived from Admiralty Rule 54.

Rule G. *Effective Date*

[An appropriate provision as to the effective date will be made either in the Rules or in the order of the Supreme Court transmitting them to Congress.]

***369 APPENDIX III**

TABLE SHOWING DISPOSITION OF ADMIRALTY RULES

Admiralty rule

1	As to commencement of action see FRCP 3; as to service of process see FRCP 4(c).
2	As to summons, see FRCP 4; as to arrest of the person, see Note to Supplemental Rule A; as to attachment and garnishment, see Supplemental Rule B(1).
3	See Note to Supplemental Rule A.
4	See Note to Supplemental Rule A. As to summary procedure against surety, see FRCP 65.1 (Proposed).
5	See Supplemental Rule E(5). As to summary procedure against surety, see FRCP 65.1 (Proposed).
6	See Supplemental Rule E(5).
7	See FRCP 54(d).
8	See Supplemental Rule E(6).
9	See Supplemental Rule C(5).
10	See Supplemental Rules C(3), C(4), E(4).
11	See Supplemental Rule E(9).
12	See Supplemental Rules E(5), E(9).
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16	See Supplemental Rule C(1).
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19	See Supplemental Rule D.
20	See FRCP 69–71.
21	See FRCP 8; Supplemental Rule C(2).
22	See FRCP 8; Supplemental Rules B(1), C(2), F(2).
23	See FRCP 15.
24	See Supplemental Rules E(2), F(1).
25	See Supplemental Rule C(6).
26	See FRCP 7–12.
27	See FRCP 12, 56.
28	See FRCP 55, 60.
29	See FRCP 12(f), 26 et seq.
30	See FRCP 26, 33, 37; 4 Moore's Federal Practice 1282, 2337.
30A	See FRCP 26.
30B	See FRCP 27.
30C	See FRCP 28.
30D	See FRCP 29.
30E	See FRCP 30.
30F	See FRCP 31.
30G	See FRCP 32.

31	See FRCP 33.
32	See FRCP 34.
32A	See FRCP 35.
32B	See FRCP 36.
32C	See FRCP 37.
32D	See FRCP 45.
33	See FRCP 33 and 30(b).
34	See FRCP 24(a).
35	See FRCP 11 and 12(f).
36	See Supplemental Rules B(3)(a), E(4).
37	See Supplemental Rule C(3).
38	See FRCP 41(b).
39	See FRCP 55(c), 60(b).
40	See Supplemental Rule E(9).
41	Superseded; covered by 28 U.S.C., §§ 2041, 2042.
42	See FRCP 24.
43	See FRCP 53.
43 1/2	See FRCP 53.
44	See FRCP 83.
44 1/2	See FRCP 16.
45	Omitted because the practice of taking further proof on

	appeal is virtually obsolete, and also because regulation of the practice on appeal seems beyond the scope of the rule-making power conferred by 28 U.S.C., § 2073. 46 See FRCP 43 and 28 U.S.C., § 753.
46 1/2	See FRCP 52. 46A See FRCP 43(b). 46B See FRCP 43(c).
47	See FRCP 54(d).
48	See FRCP 7(a), 8(d), and 12(a), (b).
49	See FRCP 75, 76.
50	See Supplemental Rule E(7).
51	See Supplemental Rules F(1), F(2), F(3), F(4).
52	See Supplemental Rules F(5), F(6), F(7), F(8).
53	See Supplemental Rules F(2), F(5).
54	See Supplemental Rule F(9).
55	Omitted as obsolete. A temporary provision designed to give the benefit of limitation to owners in cases pending on appeal when the limitation rules were promulgated.
56	See FRCP 14.
57	See Supplemental Rule E(5).
58	See FRCP 56.
59	See FRCP 57.

***371 PART II**

AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS PROPOSED BY THE ADVISORY COMMITTEE ON CIVIL RULES

Rule 4. Process

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to ~~Rule 13(h) or~~ Rule 14, or as additional parties to a pending action *or a counterclaim or cross-claim therein* pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

Advisory Committee's Note

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to ***372** state a claim upon which relief can be granted, (7) failure to join ~~an indispensable~~ *a* party *under Rule 19*. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(g) Consolidation of Defenses *in Motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but ~~does not include therein all defenses and objections~~ *omits therefrom any defence or objection* then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on ~~any of the defenses or objections~~ *the defense or objection* so omitted, except *a motion* as provided in subdivision (h)(*2*) ~~of this rule~~ *hereof on any of the grounds there stated.*

(h) Waiver *or Preservation of Certain* **Defenses**. ~~A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, when ever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or~~

~~defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.~~ *(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.*

***373** *(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.*

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Advisory Committee's Note

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Present subdivision (g) forbids a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Present subdivision (h) calls for waiver of "... defenses and objections which he [defendant] does not present ... by motion ... or, if he has made no motion, in his answer...." If the clause "if he has made no motion," is read literally, it seems that the omitted defense is waived and cannot be pleaded in the answer. On the other hand, the clause may be read as adding nothing of substance to the preceding words; in that event it appears that a defense is not waived by reason of being omitted from the motion and may be set up in the answer. The decisions are divided. Favoring waiver, see *Keefe* v. *Derounian*, 6 F.R.D. 11 (N.D.Ill.1946); *Elbinger* v. *Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D.Wis.1956); *see also Rensing v. Turner Aviation Corp.*, 166 F.Supp. 790 (N.D.Ill.1958); *P. Beiersdorf & Co.* v. *Duke Laboratories, Inc.*, 10 F.R.D. 282 (S.D.N.Y.1950); *Neset* v. *Christensen*, 92 F.Supp. 78 (E.D.N.Y.1950). Opposing waiver, see *Phillips* v. *Baker*, 121 F.2d 752 (9th Cir.1941); *Crum* v. *Graham*, 32 F.R.D. 173 (D.Mont.1963) (regretfully following the *Phillips* case); see also *Birnbaum* v. *Birrell*, 9 F.R.D. 72 (S.D.N.Y.1948); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D.Tenn.1940); *cf. Carter v. American Bus Lines, Inc.*, 22 F.R.D. 323 (D.Neb.1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person,

improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b) (2)–(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

***374** By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

Rule 13. Counterclaim and Cross–Claim

~~**(h) Additional Parties May be Brought in** *Joinder of Additional Parties*. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.~~ *Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.*

Advisory Committee's Note

Present Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, partakes of some of the textual difficulties of present Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; *cf.* 3 *Moore's Federal Practice* ¶ 13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, *Federal Practice & Procedure* § 399 (Wright ed. 1960). Rule 13(h) is also inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized “ancillary” Federal jurisdiction over counterclaims and cross-claims and “ancillary” venue as to parties to these claims.

***375 Rule 15. Amended and Supplemental Pleadings**

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.*

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Advisory Committee's Note

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp.III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a non-existent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision ... that suit be brought within sixty days ...." *Cohn* v. *Federal Security Adm.*, 199 F.Supp. 884, 885 (W.D.N.Y.1961); see also *Cunningham* v. *United States*, 199 F.Supp. 541 (W.D.Mo.1958); *Hall* v. *Department of HEW*, 199 F.Supp. 833 (S.D.Tex.1960); *Sandridge* v. *Folsom, Secretary of HEW*, 200 F.Supp. 25 (M.D.Tenn.1959).

Analysis in terms of "new proceeding" is traceable to *Davis* v. *L.L. Cohen & Co.*, 268 U.S. 638, 45 S.Ct. 633, 69 L.Ed. 1129 (1925), and *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460, 48 S.Ct. 150, 72 L.Ed. 372 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back." As lower courts have continued to rely on the *Davis* and *Mellon* cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

***376** Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5)). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the reality, but is merely question-begging; and to deny relation back is to defeat unjustly the

claimant's opportunity to prove his case. See the full discussion by Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv.L.Rev. 40 (1963).

Much the same question arises in other types of actions against the government (see Byse, *supra*, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, *Federal Practice & Procedure* § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 *Moore's Federal Practice* ¶ 15.15 (Cum.Supp.1962); Annot., *Change in Party After Statute of Limitations Has Run*, 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct ... set forth ... in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, *first*, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, *second*, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the *first* and *second* requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d) (4) and (5)). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the proposed amendment of Rule 17(a) (real party in interest) formulated by the Advisory Committee on Admiralty Rules and approved by the Advisory Committee on Civil Rules. To avoid forfeitures of just claims, revised Rule 17(a) would provide that certain enumerated types of cases shall not be dismissed on the ground that they are not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated; and the Note indicates that the enumeration of cases is not intended to have any negative implications for judicial avoidance of forfeitures in other cases. *Cf. Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir.1963); pp. 341–342, *supra*.

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. ~~The plaintiff in his complaint or in a reply setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a~~ ***377** ~~like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied.~~ *A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join either as independent or as alternate claims as many claims, legal, equitable, or maritime, [FNa3] as he has against an opposing party.*

Advisory Committee's Note

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland,

The New Federal Rules, 45 W.Va.L.Q. 5, 13 (1938); see Clark, *Code Pleading* 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a) —"if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied"—has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In *Federal Housing Admr. v. Christianson*, 26 F.Supp. 419 (D.Conn.1939), the indorsee of two notes sued the three co-makers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the *Christianson* case and other authorities, see 2 Barron & Holtzoff, *Federal Practice & Procedure* § 533.1 (Wright ed. 1961); 3 *Moore's Federal Practice* ¶ 18.04[3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. *Cf.* Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn.L.Rev. 580, 605–06 (1952). Thus, if it could be found in the *Christianson* situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, *supra*, at 199; see also *id.* at 198 n. 60.4; *cf.* 3 *Moore's Federal Practice*, *supra*, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim ***378** to be later decided. See 2 Barron & Holtzoff, *supra*, § 533.1; Wright, *supra*, 36 Minn.L.Rev. at 604–11; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. 874, 970–71 (1958); Commentary, *Relation Between Joinder of Parties and Joinder of Claims*, 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the *Christianson* case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the *Christianson* decision and similar authority, but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See *Noland Co., Inc.* v. *Graver Tank & Mfg. Co.*, 301 F.2d 43, 49–51 (4th Cir.1962); but *cf. C.W. Humphrey Co.* v. *Security Alum. Co.*, 31 F.R.D. 41 (E.D.Mich.1962). This permitted joinder of

claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claims if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Rule 19. Necessary Joinder of Parties

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction or the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non Joinder to be Pleaded. In any pleading in which relief is asked, ***379** the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Rule 19. *Joinder of Persons Needed for Just Adjudication*

(a) Persons to be Joined if Feasible. Whenever a "contingently necessary" person, as hereafter defined, is subject to service of process and his joinder would not deprive the court of jurisdiction over the subject matter of the action, he shall be joined as a party in the action. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

(b) Determination by Court Whenever Joinder Not Feasible. If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties

before it or ought to be dismissed. The factors to be considered by the court include: first, to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the contingently necessary person would be adequate; fourth, whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of contingently necessary persons who are not joined, and the reasons why they are not joined.

***380** *(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.*

Advisory Committee's Note<

General Considerations

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Defects in the Present Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum.L.Rev. 1254 (1961), and Rule 19 in its present form can be and often has been applied in consonance with them. But experience has shown that the rule is defective in its phrasing and does not point clearly to the proper basis of decision.

Textual defects. (1) The expression “persons ... who ought to be parties if complete relief is to be accorded between those already parties,” appearing in present subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it is not adequately descriptive of those persons.

(2) The word “indispensable,” appearing in present subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implies that there may be interested persons, not “indispensable,” in whose abesnce the action ought also to be dismissed. Further, it seems at least superficially plausible to equal the word “indispensable” with the expression “having a joint interest,” appearing in

present subdivision (a). See *United States* v. *Washington Inst. of Tech., Inc.*, 138 F.2d 25, 26 (3d Cir.1943); *cf. Chidester* v. *City of Newark*, 162 F.2d 598 (3d Cir.1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" directs attention to the technical or abstract character of the rights or obligations of the persons whose joinder is in question, and correspondingly distracts attention from the pragmatic considerations which should be controlling.

***381** (4) The rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person is "subject to the jurisdiction of the court as to both service of process and venue," speaks of whether the person can be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression uses "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression is apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who is "indispensable" or "who ought to be [a] part[y]" itself deprives the court of the power to adjudicate as between the parties already joined. See *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F.2d 703, 707 (3d Cir.1940); *McArthur* v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617, 621 (3d Cir.1949); *cf. Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir.1946), *cert. denied*, 329 U.S. 782, 67 S.Ct. 205, 91 L.Ed. 671 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, *supra*, 55 Mich.L.Rev. at 332–34.

Failure to point to correct basis of decision. The present rule does not state affirmatively what factors are relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons is infeasible. In some instances courts have not undertaken the relevant inquiry or have been misled by the "jurisdiction" fallacy. In other instances there has been undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief for other precautions.

Although these difficulties cannot be said to have been general, analysis of the cases shows that there is good reason for attempting to strengthen the rule. The literature also indicates how the rule should be reformed. See Reed, *supra* (discussion of the important case of *Shields* v. *Barrow*, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, *supra*; N.Y. Temporary Comm. on Courts, *First Preliminary Report*, Legis.Doc.1957, No. 6(b), pp. 28, 233; N.Y.Judicial Council, Twelfth Ann.Rep., Legis.Doc.1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, *Final Report*, Pt. III, p. 69 (1960); Note, *Indispensable Parties in the Federal Courts*, 65 Harv.L.Rev. 1050 (1952); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen. Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, § 1001 (effective Sept. 1, 1963).

The Amended Rule

New *subdivision (a)* defines the persons, called "contingently necessary," whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the

parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, *supra*, 55 Mich.L.Rev. at 330, 338; Note, *supra*, 65 Harv.L.Rev. at 1052–57; *Developments in the Law, supra*, 71 Harv.L.Rev. at 881–85.

The definition of contingently necessary persons is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, *First Preliminary Report, supra; Developments in the Law, supra*, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 ***382** *Moore's Federal Practice* 2153 (2d ed. 1963); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a contingently necessary person is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b). When a contingently necessary person cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos* v. *Texas Co.*, 23 F.2d 171 (2d Cir.1927), *cert. denied*, 277 U.S. 587, 48 S.Ct. 434, 72 L.Ed. 1001 (1928); *Niles–Bement–Pond Co.* v. *Iron Moulders' Union*, 254 U.S. 77, 80, 41 S.Ct 39, 65 L.Ed. 145 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, *supra; cf. A.L. Smith Iron Co.* v. *Dickson*, 141 F.2d 3 (2d Cir.1944); *Caldwell Mfg. Co.* v. *Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y.1955).

The *second factor* calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, *e.g.*, the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward* v. *Deavers*, 203 F.2d 72 (D.C.Cir.1953); *Miller & Lux, Inc.* v. *Nickel*, 141 F. Supp. 41 (N.D.Calif.1956). On the use of "protective provisions," see *Roos* v. *Texas Co., supra; Atwood v. Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir.1921), *cert. denied*, 257 U.S. 661, 42 S.Ct. 270, 66 L.Ed. 422 (1922); *cf. Stumpf* v. *Fidelity Gas Co.*, 294 F.2d 886 (9th Cir.1961); and the general statement in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 363, 60 S.Ct. 569, 84 L.Ed. 799 (1940).

Sometimes the party is himself able to take

measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See *Hudson* v. *Newell*, 172 F.2d 848, 852, *mod.*, 176 F.2d 546 (5th Cir.1949); *Gauss* v. *Kirk*, 198 F.2d 83, 86 (D.C. Cir.1952); *Abel* v. *Brayton Flying Service, Inc.*, 248 F.2d 713, 716 (5th Cir.1957) (suggestion of possibility of counterclaim under Rule 13(h)); *cf. Parker Rust–Proof Co.* v. *Western Union Tel. Co.*, 105 F.2d 976 (2d Cir.1939), *cert. denied*, 308 U.S. 597, 60 S.Ct. 128, 84 L.Ed. 500 (1939). So also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. *See Developments in the Law, supra*, 71 Harv.L.Rev. at 882; Annot., *Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship*, 134 A.L.R. 335 (1941); *Johnson* v. *Middleton*, 175 F.2d 535 (7th Cir.1949); *Kentucky Nat. Gas Corp.* v. *Duggins*, 165 F.2d 1011 (6th Cir.1948); *McComb* v. *McCormack*, 159 F.2d 219 (5th Cir.1947). The court should consider whether this, in turn, would impose undue hardship on the absentee.

The *third factor*—whether an "adequate" judgment can be rendered in the absence of the contingently necessary person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the ***383** other factors, especially the "shaping of relief" mentioned under the second factor. *Cf. Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir.1949), *cert denied*, 339 U.S. 983, 70 S.Ct. 1026, 94 L.Ed. 1386 (1950).

The *fourth factor*, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald* v. *Haynes*, 241 F.2d 417, 420 (3d Cir.1957); *Fouke* v. *Schenewerk*, 197 F.2d 234, 236 (5th Cir.1952); *cf. Warfield* v. *Marks*, 190 F.2d 178 (5th Cir.1951).

The subdivision does not use the word "indispensable" which has often been employed in the past as descriptive of persons in whose absence an action should be dismissed. "Indispensable" has suggested some iron rule of joinder based on categorization of rights, whereas a different approach is taken in the present subdivision.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; *cf.* Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. *Cf.* Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign immunity or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the

new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson* v. *Kirkland*, 290 F.2d 440, 446–47 (5th Cir.1961) (stressing the practical orientation of the decisions); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54, 75 S.Ct. 591, 99 L.Ed. 868 (1955). Recent legislation, P.L. 87–748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all ~~of them~~ *these persons* ***384** will arise in the action. All persons (*and any vessel, cargo or other property subject to admiralty process in rem*) [FNa4] may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transactions or occurences and if any question of law or fact common to all ~~of them~~ *these persons* will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Advisory Committee's Note

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word “them,” as it appears in two places in Rule 20(a), has contributed to the view, taken by some courts, that this rule limits the joinder of claims in certain situations of permissive party-joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, *Federal Practice & Procedure* 202 (Wright ed. 1961).

~~Rule 23. Class Actions~~

~~**(a) Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is~~

~~(1) joint or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;~~

~~(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or~~

~~(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.~~

~~**(b) Secondary Action by Shareholders.** In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver ***385** (1) that the plaintiff was a shareholder at~~

~~the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.~~

~~**(c) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.~~

Rule 23. *Class Actions*

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making ****386*** *appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or*

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) Determination by Order Whether Class Action to be Maintained; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a nonclass action, may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may, without limitation, make appropriate orders: (1) settling the course of proceedings ****387*** *or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.*

(e) Dismissal or Compromise. An action maintained as a class action shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

Advisory Committee's Note

Difficulties with present rule. The present categories of class actions are defined in terms of the abstract nature of the rights involved: the so-called "true" category is defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570–76 (1937).

In practice the terms "joint," "common," etc., which are used as the basis of the Rule 23 classification have proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245–46, 256–57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe,

Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329–36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts have had considerable difficulty with these terms. See, *e.g.*, *Gullo* v. *Veterans' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C.1952); *Shipley* v. *Pittsburgh & L.E.R. Co.*, 70 F.Supp. 870 (W.D.Pa.1947); *Deckert* v. *Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa.1939), *rev'd*, 108 F.2d 51 (3d Cir.1939), *rev'd*, 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed. 189 (1940), *on remand*, 39 F.Supp. 592 (E.D.Pa.1941), *rev'd sub nom. Pennsylvania Co. for Ins. on Lives* v. *Deckert*, 123 F.2d 979 (3d Cir.1941) (see Chafee, *supra*, at 264–65).

Nor has the rule provided an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying ***388** actions as "true" or intimating that the judgments will be decisive for the class where these results seem appropriate but are reached by dint of depriving the word "several" of coherent meaning. See, *e.g.*, *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir.1950); *Wilson* v. *City of Paducah*, 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), *cert. denied*, 323 U.S. 776, 65 S.Ct. 187, 89 L.Ed. 620 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers' & C. Assn.* v. *Philad Co.*, 34 F.Supp. 264 (D.Del.1940); 41 F.Supp. 701 (D.Del.1940), *aff'd mem.*, 129 F.2d 1020 (3d Cir.1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, *e.g.*, *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), *aff'd*, 230 F.2d 717 (3d Cir.1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), *rev'd on grounds not here relevant*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (see Chafee, *supra*, at 208); *cf. Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir.1944), *cert. denied*, 325 U.S. 867, 65 S.Ct. 1404, 89 L.Ed.1986 (1945). But *cf.* the early decisions, *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by present Rule 23 is in any event an anomaly because, although denominated a "class" action and pleaded as such, it is supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice* ¶¶ 23.10[1], 23.12 (2d ed. 1963). These results have been attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir.1961), *pet. cert. dism.*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1963); but *cf. P.W. Husserl, Inc.* v. *Newman*, 25 F.R.D. 264 (S.D.N.Y.1960); *Athas* v. *Day*, 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen* v. *Black*, 234 F.2d 12 (10th Cir.1956), *cert. granted*, 352 U.S. 888, 77 S.Ct. 127, 1 L.Ed.2d 84 (1956), *dism. on stip.*, 355 U.S. 600, 78 S.Ct. 530, 2 L.Ed.2d 523 (1958); but *cf. Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the present rule does not squarely address itself to the question of the measures that may be taken during the course of the action to

assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, *supra*, at 230–31; *Keeffe, Levy & Donovan, supra;* *Developments in the Law, supra*, 71 Harv.L.Rev. at 937–38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062–65 (1954); Note, *Federal Class Actions: A suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833–36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments extending to the class, as defined, whether or not favorable to it; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458–59 (1960); ***389** 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351–52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, *e.g.*, *Giordano* v. *Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir.1950); Zachman v. Erwin, 186 F.Supp. 681 (S.D.Tex.1959); *Baim & Blank, Inc.* v. *Warren–Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the "contingently necessary" persons under Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254, 1259–60 (1961): *cf.* 3 Moore, *supra*, ¶ 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben–Hur* v. *Cauble*, 255 U.S. 356, 366–367, 41 S.Ct. 338, 65 L.Ed. 673 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney*, 219 F.2d 529 (9th Cir.1955); *Rank* v.

Krug, 142 F.Supp. 1, 154–59 (S.D.Calif.1956), *on app.*, *State of California* v. *Rank*, 293 F.2d 340, 348 (9th Cir.1961); *Gart* v. *Cole*, 263 F.2d 244 (2d Cir.1959), *cert. denied*, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959); *cf. Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir.1955); 3 Moore, *supra*, ¶ 23.11 [2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben–Hur* v. *Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn.1939); *cf. Smith* v. *Swormstedt*, 16 How. (57 U.S.) 288, 14 L.Ed. 942 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or preemption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that ***390** each shareholder has an individual claim. See *Knapp* v. *Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), *aff'd*, 230 F.2d 717 (3d Cir.1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36 (3d Cir.1947); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel* v. *Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich.1951), *app. dism.*, 195 F.2d 361 (6th Cir.1952); *Goldberg* v. *Whittier Corp.*, 111 F.Supp. 382 (E.D.Mich.1953); *Dann* v. *Studebaker–Packard Corp.*, 288 F.2d 201 (6th Cir.1961); *Edgerton* v. *Armour & Co.*, 94 F.Supp. 549 (S.D.Calif.1950); *Ames* v. *Mengel Co.*, 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1.) The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), *cert. denied*, 323 U.S. 776, 65 S.Ct. 187, 89 L.Ed. 620 (1944); *cf. York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), *rev'd on grounds not here relevant*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) .

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. *Cf. Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir.1952), *cert. denied*, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed. 678 (1952); 3 Moore, *supra*, at ¶ 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See

Heffernan v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341–46 (S.D.N.Y.1946); 334 U.S. 131, 144–148, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (*b*)(*2*). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See ***391***Potts* v. *Flax*, 313 F.2d 284 (5th Cir.1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir.1963), *cert. denied*, *City of Jackson* v. *Bailey*, Feb. 17, 1964, 84 S.Ct. 666; *Brunson* v. *Board of Trustees of School District No. 1, Clarendon Cty., S.C.*, 311 F.2d 107 (4th Cir.1962), *cert. denied*, 373 U.S. 933, 83 S.Ct. 1538, 10 L.Ed.2d 690 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir.1962) ; *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir.1957), *cert. denied*, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir.1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir.1962), *cert. denied*, 370 U.S. 944, 82 S.Ct. 1586, 8 L.Ed.2d 810 (1962); *Frasier* v. *Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C.1955, 3–judge court), *aff'd*, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (*b*)(*3*). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity

of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Chafee, *supra*, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetuated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F.J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir.1944); *Miller* v. *National City Bank of N.Y.*, 166 F.2d 723 (2d Cir.1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir.1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir.1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R.* v. *United States*, 111 F.Supp. 80 (D.N.J.1953); *cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir.1961), *pet. cert. dism.*, 371 U.S. 801, 83 S.Ct 13, 9 L.Ed.2d 46 (1963); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir.1941); *Kainz* v. *Anheuser–Busch, Inc.*, 194 F.2d 737 (7th Cir.1952) *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

***392** That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. *Cf.* Weinstein, *supra*, 9 Buffalo L.Rev. at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Pre–Trial Procedure of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)–(C) are listed, non-exhaustively, as pertinent to the findings. The court is to consider any justifiable interest of individual members of the class in carrying on their own litigations as they see fit. See *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 88–90, 93–94 (7th Cir.1941) (anti-trust action); *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3d Cir.1945), and Chafee, *supra*, at 273–75 (regarding policy of Fair Labor

Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a)). In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the opportunity of members to request exclusion from the class.)

Also pertinent to the findings required by subdivision (b)(3) are the questions of management which are likely to arise in the conduct of a class action, including the question whether the particular district is a practically suitable location for trial.

Subdivision (*c*)(*1*). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable and in any event before the decision on the merits, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4), first alternative. Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

***393** In exceptional situations, an action brought as a nonclass action may be seen to be suited to class-action treatment. See subdivision (d)(4), second alternative.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (*c*)(*2*). The adjudication in a class action maintained as such to the end will extend by its terms to the class, as defined, whereas a nonclass action results in an adjudication that does not by its terms reach beyond the parties including individuals who intervene or otherwise come into the action before the decision on the merits. Compare subdivision (c)(3) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, *supra*, ¶23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision

on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir.1961), *pet. cert. dism.*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir.1944), *rev'd on grounds not here relevant*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d Cir.1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn.* v. *Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, *supra*, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632–33 (1958); *Developments in the Law, supra*, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, *supra*, § 568; but *cf. Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28–29 (W.D.Mo.1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976–77 (S.D.Calif.1942); Chafee, *supra*, at 280, 285; 3 Moore, *supra*, ¶ 23.12, at 3476. Under proposed subdivision (c)(2), one-way intervention is excluded; the action will have been determined to be a class or nonclass action before the decision on the merits, and in the former case the judgment, whether or not favorable, will extend to the class, as defined.

The second and third sentences of subdivision (c)(2) make special provision for defining the class where the action falls within subdivision (b)(3) and is maintained thereunder. As noted in the discussion of subdivision (b)(3), the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when an action is maintained under subdivision (b)(3), any member is entitled to request exclusion from the class, and the court must grant his request unless it finds that his inclusion is essential to fair and efficient adjudication. The court is required to direct that reasonable notice be given, including specific notice to any member engaged in separate litigation, in order to afford opportunity for members to request exclusion. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Although declaring that the judgment in a class action extends to the class, as defined, subdivision (c)(2) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or reach shall be, and if the matter is carefully considered, ***394** questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, *supra*, at 294; Weinstein, *supra*, 9 Buffalo L.Rev. at 460.

Subdivision (c)(3). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the

proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951), and 1950–51 CCH Trade Cases 64573–74 (¶ 62869); *cf. Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir.1941), and notice may encourage interventions to improve the representation of the class. *Cf. Oppenheimer* v. *F.J. Young & Co.*, 144 F.2d 387 (2d Cir.1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to request exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), will thoroughly fulfill requirements of due process in class actions within the subdivision (b)(3) category. See *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *cf. Dickinson* v. *Burnham*, 197 F.2d 973, 979 (2d Cir.1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247, 249 (2d Cir.1954); *Gart* v. *Cole*, 263 F.2d 244, 248–49 (2d Cir.1959), *cert. denied*, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, *supra*, at 230–31; *Brendle* v. *Smith*, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should ***395** not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass.1962); *Hormel* v. *United States*, 17 F.R.D. 303 (S.D.N.Y.1955).

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, *e.g.*, on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) corresponds with present Rule 23(c). Approval by the court continues to be required for the dismissal or compromise of any class action, but notice to the class is discretionary with the court. The mandatory notice of present Rule 23(c) was primarily directed to derivative actions by shareholders, see *Cunningham* v. *English*, 269 F.2d 539

(D.C.Cir.1959), and the requirement is continued for such actions by new Rule 23.1.

Special Note To Bench And Bar: The Advisory Committee recognizes that the proposal embodied in subdivision (b)(3) and the related subdivision (c)(2) is novel. Accordingly, the Committee will particularly welcome comments on this proposal.

Rule 23.1. *Derivative Actions by Shareholders*

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (*1*) *that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and* (*2*) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary under the applicable law, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may be maintained only if the court is satisfied that the plaintiff will adequately represent the interest of the corporation or association. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23*(d)* . *The action may be dismissed or compromised only with the approval of the court upon notice to shareholders or members in such manner as the court may direct.*

Advisory Committee's Note

A derivative action by a shareholder (and correspondingly by a member of an unincorporated association) has been traditionally viewed as a class action at least where the shareholders are numerous. See 3 *Moore's Federal Practice* ¶ 23.08 (2d ed. 1963). However, it has distinctive features which ***396** require special provisions, and these are needed even when the shareholders are not a numerous group. Accordingly Rule 23.1 deals separately with derivative actions, referring where appropriate to Rule 23, as amended. See also Advisory Committee's Note to Rule 23(e), as amended.

Rule 23.2. *Actions Relating to Unincorporated Associations*

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if the court is satisfied that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(*d*) *, and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23*(*e*).

Advisory Committee's Note

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, *Pleading and Procedure: State and Federal* 718 (1962); 3 *Moore's Federal Practice* ¶ 23.08 (2d ed. 1963); Story, J. in *West* v. *Randall*, 29 Fed.Cas. 718, 722–23, No. 17,424 (C.C.D.R.I.1820); and, for examples, *Gibbs* v. *Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 (1939); *Tunstall* v. *Brotherhood of Locomotive F. & E.*, 148 F.2d 403 (4th Cir.1945); *Oskoian* v.

Canuel, 269 F.2d 311 (1st Cir.1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the ~~representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof~~ *applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.*

Advisory Committee's Note

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the ***397** proposals for revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying those proposals.

Present Rule 24(a)(3) provides for intervention of right where the applicant establishes that he will be adversely affected by the distribution or disposition of property involved in an action to which he has not been made a party. Significantly, some decided cases have virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action." 4 *Moore's Federal Practice* ¶ 24.09 [3], at 55 (2d ed. 1962), and see, *e.g.*, *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.1960). This development is quite natural, for Rule 24(a)(3) is unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, *Pleading and Procedure: State and Federal* 749–50 (1962).

The general purpose of present Rule 24(a)(2) is to entitle an absentee, purportedly represented by a party, to intervene in the action if he can establish with fair probability that the representation is inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Present Rule 24(a)(2), however, makes it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this has recently created difficulties with intervention in class actions. If the "bound" language is read literally in the sense of *res judicata*, it can defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extends by its terms (see Rule 23(c)(2), as amended) may be entitled

to show in a later action, when the judgment in the class action is claimed to operate as *res judicata* against him that the "representative" in the class action had not in fact adequately represented him. If he can make this showing, the class-action judgment may be held not to bind him. See *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Now if a class member seeks to intervene in the class action proper, while it is still pending, on grounds of inadequacy of representation, he can be met with the argument: if the representation is in fact inadequate, he will not be "bound" by the judgment when it is subsequently asserted against him as *res judicata*, hence he is not entitled to intervene; if the representation is in fact adequate, there is no occasion or ground for intervention. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961); cf. Sutphen Estates, Inc., v. United States, 342 U.S. 19, 72 S.Ct. 14, 96 L.Ed. 19 (1951). This reasoning may be linguistically justified by present Rule 24(a)(2); but it can lead to poor results. Compare the discussion in *International M. & I. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir.1962); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C.Cir.1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

***398** The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a "contingently necessary" party under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of *res judicata*.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Corp. v. Von Clemm*, and *Atlantic Refining Co. v. Standard Oil Co.*, both *supra; Wolpe v. Poretsky*, 144 F.2d 505 (D.C.Cir.1944), *cert. denied*, 323 U.S. 777, 65 S.Ct. 190, 89 L.Ed. 621 (1944); *cf. Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22 (8th Cir.1957); and generally, Annot., 84 A.L.R.2d 1412 (1962).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the

plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, ~~or~~ for improper venue, or for ~~lack of an indispensable party~~ *failure to join a party under Rule 19*, operates as an adjudication upon the merits.

Advisory Committee's Note

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

Rule 43. Evidence

(f) Interpreters. The court may appoint an interpreter of its own selection and may determine the reasonable compensation of ***399** *such interpreter, and direct its payment out of such funds as may be provided by law.*

Advisory Committee's Note

This added subdivision corresponds with new subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure as proposed by the Advisory Committee on Criminal Rules. The Note of the latter Committee states:

"This new subdivision authorizes the court to appoint and compensate interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf."

Rule 44. Proof of Official Record [FNa5]

(a) Authentication ~~of Copy.~~

(1) Domestic. An official record *kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands*, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. ~~If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the~~ *The* certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. ~~If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.~~

(*2*) *Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final* ***400** *certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a*

diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) ~~Proof of~~ Lack of Record. A written statement ~~signed by an officer having the custody of an official record or by his deputy~~ that after diligent search no record or entry of a specified tenor is found to exist in the records, *designated by the statement*, ~~accompanied by a certificate as above provided,~~ *authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record*, is admissible as evidence that the records ~~of his office~~ contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any *other* method authorized by *law*. ~~any applicable statute or by the rules of evidence at common law.~~

Advisory Committee's Note

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. *Cf. Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir.1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States* v. *Aluminum Co. of America*, 1 F.R.D. 71 (S.D.N.Y.1939). The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff,***401** *Federal Practice & Procedure* § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, *Comparative Law* 57 (2d ed. 1959); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The

process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See *New York Life Ins. Co.* v. *Aronson*, 38 F.Supp. 687 (W.D.Pa.1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate; peculiarities may exist or arise hereafter in the law of practice of a foreign country. See *United States* v. *Grabina*, 119 F.2d 863 (2d Cir.1941); and, generally, Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 548–49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ.Proc. & Prac., Proc.A.B.A., Sec. Int'l & Comp.L. 123, 130–31 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, *e.g.*, Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740 – 42, 1745; *Fakouri* v. *Cadais*, 149 F.2d 321 (5th Cir.1945), *cert. denied*, 326 U.S. 742, 66 S.Ct 54, 90 L.Ed. 443 (1945); 5 *Moore's Federal Practice* ¶ 44.05 (2d ed. 1951).

***402 Rule 44.1.** *Determination of Foreign Law* [FNa6]

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43 . The court's determination shall be treated as a ruling on a question of law.

Advisory Committee's Note

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the *first sentence* of the proposed rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The existing uncertainty under Rule 8(a) about whether foreign law must be pleaded— *compare Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir.1955), and

Pedersen v. United States, 191 F.Supp. 95 (D.Guam 1961), with Harrison v. United Fruit Co., 143 F.Supp. 598 (S.D.N.Y.1956) —is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possibly wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial, and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The *second sentence* of the proposed rule describes the materials to which the court may resort in determining an issue of foreign law. At present the district courts, applying Rule 43(a), are looking in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming, and expensive. See, generally, Nussbaum, *Proving* ****403*** *the Law of Foreign Countries*, 3 Am.J.Comp.L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The proposed rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. *Cf.* N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va.Code Ann. tit. 8, § 8—273; 2 W.Va.Code Ann. § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the proposed rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to

rely. See Schlesinger, *Comparative Law* 142 (2d ed. 1959); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv.L.Rev. 1281, 1296 (1952); *cf. Siegelman* v. *Cunard White Star, Ltd., supra*, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The proposed rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, *e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof*, 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the *third sentence*, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). Cf. Uniform Judicial Notice of Foreign Law Act § 3; Note, 72 Harv.L.Rev. 318 (1958).

The proposed rule parallels Article IV of the Uniform Interstate and International Procedure Act approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The proposed rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, *e.g.*, Story, *Conflict of Laws* § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, *Evidence* § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Supp.1961, at 134); N.Y.Civ.Prac.Laws & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, loc. cit. And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Jansson* v. *Swedish American Line*, 185 F.2d 212, 216 (1st Cir.1950); ***404***Bank of Nova Scotia* v. *San Miguel*, 196 F.2d 950, 957 n. 6 (1st Cir.1952); *Liechti* v. *Roche*, 198 F.2d 174 (5th Cir.1952); *Daniel Lumber Co.* v. *Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir.1954).

Rule 47. Jurors

(b) Alternate Jurors. The court may direct that ~~one or two~~ *not more than six* jurors in addition to the regular ~~panel~~ *jury* be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become *or are found to be* unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the ~~principal~~ *regular* jurors. An alternate juror who does not replace a ~~principal~~ *regular* juror shall be discharged after the jury retires to consider its verdict. ~~If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law.~~ *Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or*

6 alternate jurors are to be impanelled. The additional peremptory challenges may be used ~~only~~ against an alternate juror *only*, and the other peremptory challenges allowed by law shall not be used against ~~the alternates~~ *an alternate juror*.

Advisory Committee's Note

The revision of this subdivision brings it into line with a revision of Rule 24(c) of the Federal Rules of Criminal Procedure proposed by the Advisory Committee on Criminal Rules. Rule 24(c) now allows four alternate jurors, as contrasted with the two allowed in civil cases, and it is proposed to increase the number to a maximum of six in all cases. The Note of the Advisory Committee on Criminal Rules points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn."

Rule 59. New Trials; Amendment of Judgments

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. *After a motion has been thus timely served, the court in its discretion may (1) upon application and notice while the motion is pending, ***405** permit the moving party to amend the motion to state different or additional grounds; (2) grant the pending motion upon grounds not stated by the moving party and in that case the court shall specify the grounds in its order.*

Advisory Committee's Note

A party who has secured a judgment is entitled to know within a definite period of time whether his opponent is attacking the judgment by a motion for a new trial which suspends the finality of the judgment and correspondingly extends the time to take an appeal. See Rule 73(a); Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments* 2–6 (June 1946); *cf. Federal Deposit Ins. Corp. v. Congregation P.T.*, 159 F.2d 163, 166 (2d Cir.1946). The period for serving a new trial motion is set at 10 days from the entry of judgment. See Rule 59(b). It has been held that this period cannot be enlarged even by stipulation of the parties or court order. See Rule 6(b); *Wagoner v. Fairview Consol. School Dist.*, 289 F.2d 480 (10th Cir.1961); *Raughley v. Pennsylvania Rd.* Co., 230 F.2d 387 (3d Cir.1956); *Jusino v. Morales & Tio*, 139 F.2d 946 (1st Cir.1944); *Safeway Stores, Inc. v. Coe, Comm'r*, 136 F.2d 771 (D.C.Cir.1943); *John E. Smith's Sons Co. v. Lattimer Foundry & M. Co.*, 19 F.R.D. 379 (M.D.Pa.1956), *aff'd*, 239 F.2d 815 (3d Cir.1956); *cf Hulson v. Atchison, T. & S.F. Ry. Co.*, 289 F.2d 726 (7th Cir.1961), *cert. denied*, 368 U.S. 835, 82 S.Ct. 61, 7 L.Ed.2d 36 (1961); *Nugent v. Yellow Cab Co.*, 295 F.2d 794 (7th Cir.1961), *cert. denied*, 369 U.S. 828, 82 S.Ct 844, 7 L.Ed.2d 793 (1962); *Virginia Land Co. v. Miami Shipbuilding Corp.*, 201 F.2d 506 (5th Cir.1953); *Slater v. Peyser*, 200 F.2d 360 (D.C.Cir.1952). But *cf. Thompson v. Imm. & Nat. Serv.*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964) ("unique circumstances" of party relying on court's statement that motion was timely made); *Wolfsohn v. Hankin*, 84 S.Ct. 699 (1964).

The decisions have gone further. By narrow interpretation of Rule 59(b) and (d) it has been held: *First*, an effective motion for a new trial, that is, a motion timely and properly made, cannot be amended more than 10 days after entry of the judgment to state any different or additional ground; any ground thus stated by amendment is nugatory and cannot be made a basis for the trial court's granting the motion for the new trial. See *Brest* v. *Philadelphia Trans.*

Co., 24 F.R.D. 47 (E.D.Pa.1959) (on appeal, 273 F.2d 22 (3d Cir.1959)); *Marks v. Philadelphia W.D. Co.*, 125 F.Supp. 369 (E.D.Pa.1954), *aff'd*, 222 F.2d 545 (3d Cir.1955); *Russell v. Monongahela Ry. Co.*, 262 F.2d 349 (3d Cir.1958); *Francis v. Southern Pac. Co.*, 162 F.2d 813 (10th Cir.1947), *aff'd*, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798 (1948); *Bell v. Mykytiuk*, 147 F.Supp. 315 (E.D.Pa.1957), *aff'd*, 246 F.2d 938 (3d Cir.1957); *cf. McCloskey v. Kane*, 285 F.2d 297 (D.C.Cir.1960). But *cf. Alcaro v. Jean Jordeau, Inc.*, 3 F.R.D. 61 (D.N.J.1942), *rev'd on other grounds*, 138 F.2d 767 (3d Cir.1943); *Williamson v. Williamson P. & P. Co.*, 8 F.R.Serv. 76.2, case 1 (M.D.Pa.1944). *Second*, despite the fact that an effective motion for a new trial has been made, the trial court is without power to grant it by an order made after the 10 days based upon a ground not stated by the moving party but perceived and relied on by the trial court *sua sponte*. *Freid v. McGrath*, 133 F.2d 350 (D.C.Cir.1942); *National Farmers Union Auto. & Cas. Co. v. Wood*, 207 F.2d 659 (10th Cir.1953); *Bailey v. Slentz*, 189 F.2d 406 (10th Cir.1951); *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir.1940), *cert. denied*, 311 U.S. 667, 61 S.Ct. 26, 85 L.Ed. 428 (1940). (Under Rule 59(d) the court may grant a new trial within the 10 days on its own initiative.)

The two propositions just set out produce undesirable results. Once an effective new trial motion has been made, and the finality of the judgment for purposes of appeal has been thereby suspended, there is no reason for foreclosing amendment of the motion when this would be justified according to the usual standards for permitting amendments, nor is there reason for barring a decision of the motion on grounds thought meritorious by the court although not advanced by the moving party.

***406** Accordingly, Rule 59(b) is revised to state that where a new-trial motion is effectively made within the prescribed 10 days, the court may in its discretion, upon application and notice while the motion is pending, permit it to be amended to state different or additional grounds. Rule 59(b) is further revised to state that the court may grant a new-trial motion, effectively made, upon grounds not stated by the moving party. These reforms are supported by the reasoning of some judicial opinions, see *Yanow v. Weyerhauser S.S. Co.*, 274 F.2d 274 (9th Cir.1959), *cert. denied*, 362 U.S. 919, 80 S.Ct. 671, 4 L.Ed.2d 739 (1960); *Freid v. McGrath, supra*, 133 F.2d at 356 (dissenting opinion); *cf. Jackson v. Wilson Trucking Corp.*, 243 F.2d 212, 217 (D.C.Cir.1957) (dissenting opinion), and have long been urged by Professor Moore. See 6 *Moore's Federal Practice* ¶59.09[2] (2d ed. 1953).

It should be noted that the particularity called for in stating the grounds for a new-trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck v. William A. Jarvis Co.*, 250 F.2d 285 (3d Cir.1957); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir.1961); *General Motors Corp. v. Perry*, 303 F.2d 544 (7th Cir.1962); *cf. Grimm v. California Spray–Chemical Corp.*, 264 F.2d 145 (9th Cir.1959); *Cooper v. Midwest Feed Products Co.*, 271 F.2d 177 (8th Cir.1959). It is not contemplated that the revised rule shall be availed of to permit an amendment which merely elaborates upon the grounds stated in the original motion. An application for permission to amend the motion should in all events be made as promptly as possible. As the grant or denial of an application is in the court's discretion, it may take into account all relevant considerations, including delay in making the application. In no event may an application be made after the motion for the new trial is decided.

Rule 65. Injunctions

(a) Preliminary~~;Notice~~ *Injunction.*

(*1*) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(*2*) *Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial, and, as far as feasible, shall not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.*

(b) Temporary Restraining Order; Notice; Hearing; Duration. ~~No~~ *A* temporary restraining order ~~shall~~ *may* be granted without *written or oral* notice to the adverse party *or his attorney* ~~unless~~ *only if* (*1*) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before ~~notice can be served and a hearing had thereon~~ *the adverse party or his attorney can be heard in opposition, and* (*2*) *the applicant's*****407*** *attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required.* Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(f) Impounding Under Copyright Law. This rule applies to the impounding of articles alleged to infringe a copyright provided for in Title 17, U.S.C., § 101(c).

Advisory Committee's Note

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that

consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence is not to be repeated on the trial if repetition can be feasibly avoided. To prohibit repetition altogether would be ***408** impractical and unwise; for example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is necessary to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co.* v. *Transport Workers Union*, 278 F.2d 693, 694 (3d Cir.1960); *Arvida Corp.* v. *Sugarman*, 259 F.2d 428, 429 (2d Cir.1958); *Lummus Co.* v. *Commonwealth Oil Ref. Co., Inc.*, 297 F.2d 80, 83 (2d Cir.1961), *cert. denied* 368 U.S. 986, 82 S.Ct. 601, 7 L.Ed.2d 524 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (f). See the Advisory Committee's Notes to Rule 81(a)(1) and "Rescission of the Copyright Rules (Proposed Order of Court)," below.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

(1) These rules do not apply to *prize* proceedings in admiralty *governed by Title 10,*

U.S.C., §§ 7651–81. [FNa7] They do not apply to proceedings in bankruptcy ~~or proceedings in copyright under Title 17, U.S.C.,~~ except in so far as they may be made applicable thereto***409** by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia except to appeals therein.

Advisory Committee's Note

Special Copyright Rules governing certain procedures in actions under the Copyright Act were promulgated by the Supreme Court in 1909, pursuant to a limited rulemaking power conferred upon the Court by section 25(e) of the Copyright Act of 1909, 35 Stat. 1075, 1082. In 1934 the Court was granted general rulemaking power by the Rules Enabling Act, 48 Stat. 1064 (now, as amended, 28 U.S.C. § 2072). Rule 81(a)(1) of the Federal Rules of Civil Procedure, promulgated in 1938, stated that the FRCP should not apply to proceedings under the Copyright Act except as they might be made applicable by later rules to be promulgated by the Court. Rule 1 of the Copyright Rules was thereafter amended to state that proceedings under the Copyright Act should be governed by the FRCP to the extent not inconsistent with the Copyright Rules.

When the Copyright Act was codified in 1947 as Title 17 of the United States Code, section 25(e) of the Act was carried forward as 17 U.S.C. § 101(f). The Act of June 25, 1948, 62 Stat. 869, thereafter repealed § 101(f) on the ground that it was unnecessary in the light of the Rules Enabling Act.

It is now proposed to rescind the Copyright Rules, and Rule 81(a)(1) of the FRCP is proposed to be amended accordingly. The FRCP would thereafter govern the procedure in copyright actions to the same extent as they govern the procedure in the other unexcepted "suits of a civil nature" referred to in Rule 1 of the FRCP.

See the Advisory Committee's Note to "Rescission of the Copyright Rules (Proposed Order of Court)," below.

Rescission of the Copyright Rules (Proposed Order of Court)

The "Rules for practice and procedure under section 25 of an 'Act to Amend and Consolidate the Acts Respecting Copyright,' approved March 4, 1909, to take effect July 1, 1909, chapter 320, 35 Stat. 1075," promulgated by the Supreme Court of the United States on June 1, 1909, to go into effect July 1, 1909 (214 U.S., Appendix), and amended by the Court on June 5, 1939, effective September 1, 1939 (307 U.S. 652), are rescinded.

Advisory Committee's Note

The Advisory Committee proposes that the Copyright Rules be rescinded, and invites comments on this proposal from the Bar and other interested persons.

The Copyright Rules deal only with the two features of the practice in copyright cases mentioned below; otherwise the Federal Rules of Civil Procedure already govern the practice. On principle, the FRCP should extend fully to all civil cases unless there are strong functional reasons for maintaining a separate set of rules for a special class of cases. No such reasons appear to exist justifying special rules for copyright cases; moreover the Copyright Rules are believed to be objectionable in certain respects.

1. Rule 2 of the Copyright Rules requires, with certain exceptions, that copies of the allegedly infringing and infringed works accompany the complaint,***410** presumably as annexes or exhibits. This is a special rule of pleading unsupported by any unique justification. The question of annexing copies of the works to the pleading should be dealt with like the similar question of annexing a copy of a contract sued on. The FRCP permit but do not require the pleader to annex the copy. A party can readily compel the production of a copy of any relevant work if it is not already available to him.

2. Copyright Rules 3–13 set out a procedure available during the action for the seizing and impounding under bond, and also for the releasing under bond, of copies of works alleged to infringe copyright, as well as plates, matrices, and other means of making infringing copies.

These Copyright Rules seem rigid in their terms and out of keeping with the general attitude of the FRCP toward interlocutory relief. Upon the filing of an affidavit as to the location and value of the material to be seized, together with a bond, and approval of the bond, the clerk is to issue a writ directing the marshal to impound. If the stated procedure is followed, impounding is apparently to follow automatically; the rules do not state that the court retains discretion to disallow impounding in appropriate cases. The rules do not state that the plaintiff must make a showing of irreparable injury, the usual prerequisite to drastic interlocutory relief. Nor do the rules state that notice shall be given to the adverse party or his attorney of an application for impounding even when an opportunity for hearing could feasibly be provided. The adverse party's recourse under Copyright Rule 9 is to apply to the court for the return of the material after it has been impounded, whereupon the court may in its discretion order return of the material under a bond given by the adverse party in favor of the plaintiff.

Impounding is a remedy of an injunctive character afforded by 17 U.S.C. § 101(c); see also §§ 101(a), (d), 112. After rescission of the Copyright Rules, the procedure for obtaining this remedy, like the procedure for securing interlocutory injunctive relief generally, would be that prescribed in FRCP, Rule 65, as amended. This is made clear by the proposed addition to Rule 65 of subdivision (f) set forth above. See also Rule 64 (seizure of persons or property), clause (1). Rule 65 is flexible and is believed to be as well adapted to copyright cases as to other civil cases. It is consonant with 17 U.S.C. § 101 (c) which in authorizing impounding speaks of "such terms and conditions as the court may prescribe." It preserves the court's discretion, requires the conventional showing for interlocutory injunctive relief, contains suitable provisions for notice to the adverse party, and regulates appropriately the giving of security.

It is recognized that in some cases it would not be feasible to give notice to the adverse party or his attorney of an application for a temporary order to impound. FRCP, Rule 65(b) makes it possible to forego notice in such cases. Impounding beyond the period allowed for a temporary restraining order, however, could be had only on notice to the adverse party. See Rule 65(a).

It is plainly important that the procedure for impounding in copyright cases should not vary from place to place in accordance with State procedures, and that process for the purpose should run throughout the country. The procedure of Rule 65 would be uniformly applicable without regard to State procedures, and the nationwide running of process for this purpose would be insured by 17 U.S.C. § 112 and FRCP, Rule 4(f), as amended.

Rule 86. Effective Date

[A suitable provision as to effective date will be made either in Rule 86 or in the order of the Supreme Court transmitting the amendments.]

[FNa3]. With respect to "maritime" claims, see p. 342, *supra*.

[FNa4]. With respect to the words in parentheses, see pp. 342–343, *supra*.

[FNa5]. These amendments were developed collaboratively by the Advisory Committee on Civil Rules, the Commission and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743), and the Columbia Law School Project on International Procedure.

[FNa6]. This rule was developed collaboratively by the Advisory Committee on Civil Rules, the Commission

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and Advisory Committee on International Rules of Judicial Procedure (see Act of Sept. 2, 1958, 72 Stat. 1743), and the Columbia Law School Project on International Procedure.

[FNa7]. With respect to the amendment of this sentence, see pp. 349–350, *supra*.
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